UNITED NATIONS

AT

Administrative Tribunal

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3 November 1993

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 614

Case No. 636: HUNDE

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas, on 19 August 1991, Makonnen Hunde, a former staff member of the United Nations, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 18 November 1991, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal:

"...

(a) To reverse the [Joint Appeals Board] panel's majority decision [sic] dated 22 July 1991.

(b) Reinstatement of my contract of employment with the effective date of its interruption of August 16, 1990.

(c) Payment of compensation of US$450.000."

Whereas the Respondent filed his answer on 20 February 1992;

Whereas the Applicant filed written observations on 25 March 1992;

Whereas, on 15 October 1992, the President of the Tribunal ruled that no oral proceedings would be held;

Whereas, on 30 October 1992, the Applicant requested the Tribunal "to receive testimony from [a witness] who would be able to explain the ... circumstances surrounding [the Applicant's] separation from service" which allegedly resulted "as retaliation for [the Applicant's] assistance in an investigation of corruption in MULPOC [Multinational Programming and Operational Centre]."

Whereas, on 6 November 1992, the Respondent informed the Tribunal that he would conduct an investigation of the charges "in view of the seriousness of the allegations";

Whereas, on 18 November 1992, the Tribunal informed the parties that it had decided to adjourn consideration of the Applicant's case until completion of the investigation by the Respondent;

Whereas, on 30 January 1993, the Applicant's former supervisor submitted a written statement to the Tribunal;

Whereas, on 8 October 1993, the Respondent submitted to the Tribunal his assessment of allegations made by the Applicant's former supervisor in the course of the investigation referred to above;

Whereas, on 14 and 22 October 1993, the Applicant submitted additional statements;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations Economic Commission for Africa (ECA) on 22 March 1982, as a Finance Officer. He was offered a one-year intermediate-term appointment, at the L-3 level, under the 200 Series of the Staff Rules applicable to technical assistance project personnel. His appointment was successively extended for further fixed-term periods, through 15 April 1985, when he separated from service. On 17 July 1985, he re-entered the service of ECA on a one-year intermediate-term appointment under the 200 Series, as an Administrative and Finance Officer at the L-3 level, at the MULPOC, Lusaka. His appointment

was subsequently extended for further fixed-term periods, until 15 August 1990.

In August/September 1989, the ECA Administration requested a Finance Officer to conduct an investigation in Lusaka of suspected financial irregularities in the MULPOC accounts. On the basis of ECA's findings, as set forth in a report transmitted to the Director, MULPOC, Lusaka, on 13 November 1989, on which the Applicant submitted his comments on 13 December 1989, an audit was conducted by the Director, Internal Audit Division (IAD) "to verify allegations of financial irregularities at the Centre, which were mainly attributed to [the Applicant]".

The Director, IAD, conveyed to the Executive Secretary the results of the audit in a confidential report, dated 13 March 1990 (the IAD Audit Report). The audit "focused on the Centre's financial operations and included tests of transactions made during the period 1987-1989." It also reviewed "property management area" and "the implementation of the Centre's substantive programme." It confirmed a series of financial irregularities for which the Applicant was primarily responsible. Accordingly, the Director, IAD, recommended, inter alia, that ECA:

> "(a) Consider the advisability of permanently appointing another staff member to assume the functions of Administrative/Finance Officer at the Centre;
>
> (b) Decide on the disciplinary action that should be taken in respect of the [the Applicant] on the basis of the findings herein and in the [Report on Mission to MULPOC - 29 August-30 September 1989]."

On 30 March 1990, the Chief of the ECA Administration and Conference Services Division requested the Applicant "to immediately hand over to [another staff member] all functions of Administrative and Finance Officer together with all accountable documents including cheques, cash on hand plus all keys to safes, lockers, desks, offices etc." in his custody. He was also asked to "remain

at the Duty Station until further notice" On 1 April 1990, the Applicant submitted his comments on the IAD Audit Report.

On 4 April 1990, the Chief of the ECA Administration and Conference Services Division informed the Applicant that the Assistant Secretary-General for Human Resources Management (OHRM) had suspended him with full pay, with immediate effect, under staff rule 210.2, until the expiration of his appointment on 30 April 1990, pending the outcome of an investigation to be conducted in accordance with Personnel Directive PD/1/76 on Disciplinary Procedure for Staff Serving at offices away from Headquarters and Geneva.

A panel was constituted to investigate charges against the Applicant, of (1) falsifying accounting records (2) issuing cheques in his own name and depositing them in his personal Bank accounts, while recording them as payments to other staff members or local suppliers (3) violating UN Financial Rule No. 108.10 by paying staff members or office suppliers in cash instead of by cheque and (4) regularly depositing petty cash replenishment cheques in his personal bank account.

The Applicant was informed of the charges in writing and provided with a copy of the IAD Audit Report. He was advised of his right to avail himself of the advice of another staff member of his choice present at the duty station to assist him.

On 17 April 1990, the Applicant requested the Secretary-General to review the decision to suspend him from service.

On 2 May 1990, the ad hoc Investigation Panel established pursuant to Personnel Directive PD/1/76, submitted its report. After considering the Applicant's explanations, the Panel confirmed the validity of the charges set forth in the IAD Audit Report. On 18 May and 7 June 1990, the Applicant submitted to the Executive Secretary his comments on the ad hoc Investigation Panel's report.

On 6 July 1990, the Applicant submitted a preliminary statement of appeal to the Joint Appeals Board (JAB). This statement was treated as a request for review of an administrative decision under staff rule 111.2(a).

On 12 July 1990, the Applicant was informed that his appointment would be extended for "the last time" until 31 July 1990. He was subsequently informed of the extension of his appointment through 15 August 1990 and that no further extension was contemplated.

On 31 July 1990, the Applicant lodged an appeal with the JAB. At the same time, he requested that his case be referred to a Joint Disciplinary Committee. In communications dated 14 and 23 August 1990, the Director, Staff Administration and Training Division, OHRM, informed the Applicant of the reasons why this course of action was not viable and also confirmed that there would be no further extension of his appointment beyond 15 August 1990.

The Board adopted it report on 22 July 1991. The majority of the Panel recommended rejection of the appeal on the following grounds:

> "Suspension
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> 32. With regard to the issue of suspension of the Appellant from duty, the Panel referred to staff rule 103.24(b)(iii) ...
>
> 33. The majority of the Panel ... noted that the Appellant was suspended with pay on the basis of the IAD Audit Report which had found that, contrary to standard procedure, a number of cheques belonging to staff members were issued in the Appellant's name and deposited to his account, and the staff members concerned were paid in cash. Accordingly, the majority of the Panel felt there was a prima facie case of misconduct which warranted the Appellant's suspension from duty with pay pending an investigation.
>
> Prejudice
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> ...
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> 36. The majority Panel ... felt that since the Administrative Tribunal has held in Cooperman (Judgement No. 93) that the burden of proving prejudice rests with the Applicant, the Appellant had not succeeded in carrying the burden of proof necessary to establish this issue.

Non-renewal of Appellant's fixed-term appointment

37. With regard to this issue, the Panel had to consider whether the non-renewal of the Appellant's fixed-term appointment violated his terms of appointment.

...

40. The majority of the Panel observed that although the Appellant was informed that his fixed-term appointment would not be renewed, in the memorandum in which he was advised that he was being suspended on the ground of financial improprieties, the Respondent did not base the decision not to renew the Appellant's appointment on that ground. The explanation for the non-renewal of the Appellant's appointment was that his services were no longer required. Since the grounds for non-renewal of the Appellant's appointment was not a disciplinary measure, the majority of the Panel did not consider whether or not the process leading to the contested decision was in accordance with the Staff Rules relating to disciplinary cases.

41. The Panel, however, questioned the overall effectiveness of the MULPOC Administration and whether its shortcomings may have permitted the circumstances which surround this appeal.

..."

In a dissenting opinion, the third member of the Panel stated:

"1. The issue was whether the Appellant's fixed-term appointment was not renewed for misconduct or because it simply expired. I have the impression that the two concepts - 'expiration of contract' and 'misconduct' - were used in contradiction with logic and connivance with convenience. Indeed, the staff member's employment could have come to an end in one of two ways: 'gross misconduct' or 'expiration of contract'. One must make the choice between those two options.

...

4. It is the intermixing of those two concepts in the decision taken against the Appellant which made it impossible for me to share the opinion of my colleagues.

> 5. Accordingly, I recommend that the Appellant be reinstated and given a two-year fixed-term appointment and, failing this, that he be awarded compensation in the amount of six months' base salary as at 6 July 1990, the date he filed an appeal with the JAB."

On 23 July 1991, the Officer-in-Charge, Department of Administration and Management, transmitted to the Applicant a copy of the JAB report and informed him that:

> "... The Secretary-General has decided, in accordance with the recommendation of the majority of the Board, that the contested decisions be maintained and that no further action be taken in this case.
>
> In his decision concerning the non-renewal of your fixed-term appointment, the Secretary-General has borne in mind also the following considerations:
>
> (a) that where there are alternative grounds of action the Secretary-General may choose to rely on any one of them; and
>
> (b) that you were given ample opportunity to present your side of what had happened."

On 18 November 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent did not extend the Applicant's appointment as a result of allegations of gross misconduct which were not proved.

2. The Applicant did not knowingly violate any rules and caused no injury or quantifiable damage to the Organization which would warrant the punishment he received.

Whereas the Respondent's principal contentions are:

1. Outstanding performance does not create a legal expectancy to further employment with the Organization. A fortiori

a staff member involved in questionable activities cannot have a right to further employment.

2. The decision to let the Applicant's appointment expire was taken in the light of investigations into his activities and in the light of the Applicant's explanations. This decision fully respected the Applicant's due process rights to reasonable consideration for a further appointment.

The Tribunal, having deliberated from 21 October to 4 November 1992 and from 21 October to 3 November 1993, now pronounces the following judgement:

I. The Applicant was employed under the 200 Series of the UN Staff Rules on a series of intermediate-term appointments which had been renewed from time to time. The expiration date of his last appointment was 30 April 1990. Prior thereto, the Secretary-General had requested the Executive Secretary of ECA to establish a review committee to investigate the report of the Director, Internal Audit Division, to the effect that the Applicant had been guilty of a number of financial irregularities. The Applicant's contract was extended until 15 August 1990, to allow time for completion of the review by the Committee.

II. The Applicant was therefore at risk of separation for two causes: (a) the expiration of his fixed-term contract, as extended; and (b) dismissal for serious misconduct under staff regulation 10.2.

III. In the present case, the Administration chose to separate the Applicant because of the expiration of his contract of employment and not for misconduct. In Judgement No. 576, Makwali (1992), under different circumstances, the Tribunal determined that the failure by the Administration to complete an investigation into alleged misconduct when such allegation had been taken into account in the decision to allow the fixed-term appointment to expire,

constituted a flaw in procedure causing injury to the Applicant. The Tribunal has reached a similar result in other like cases. Unlike Makwali, in the present case, the Applicant's rights to due process were fully respected, as there were three investigations, in accordance with Personnel Directive PD/1/76, into the alleged financial irregularities and the Applicant was given, and availed himself, of the opportunity to state his case. The Tribunal is satisfied that, in the circumstances of this case, the non-extension of the Applicant's contract was not a concealed disciplinary measure.

IV. Under staff rule 204.3(a)(iv), "A temporary appointment does not carry any expectancy of renewal." An expectancy of renewal may, however, be created by surrounding circumstances. (Judgement No. 142, Bhattacharyya).

The Tribunal finds that nothing in the surrounding circumstances gave rise to an expectancy of renewal of the Applicant's contract. The excellence of his previous performance did not do so. (Judgement No. 205, El-Naggar). Nor did the series of renewals of his fixed-term contracts. (Judgement No. 422, Sawhney). It was, therefore, open to the Respondent to elect to allow the Applicant's contract to run out without further extension. (Cf. Judgement No. 611, Traore (1993). Accordingly, the Tribunal rejects his pleas for reinstatement and payment of compensation for moral damages.

V. The Tribunal has noted the Applicant's assertion that certain pages of the annexes attached to the Respondent's answer have been "erased" by the Respondent. However, the material omitted from those Annexes related only to another Finance Officer, while other material omitted relating to the Applicant was a summary of material provided elsewhere. The Tribunal concludes that these so-called "erasures" in no way damaged the Applicant's case.

VI. The Tribunal received a communication with an attachment thereto from the Applicant's counsel, dated 30 October 1992, which the Tribunal granted leave to submit. It contains allegations, supporting the Applicant's position, by a former UNDP Representative who was involved in the investigation of corruption. He says that his views on the Applicant's performance were never sought. Although there was, in the opinion of the Tribunal, no requirement that the Respondent investigate these allegations or seek these views referred to, before deciding to allow the Applicant's fixed-term appointment to expire, the Tribunal was informed by counsel for the Respondent that he wished to investigate the allegations. This was done and the result has been communicated to the Tribunal. The Respondent has provided a reasonable explanation for declining to accept as fact the allegations made by the former UNDP Representative. The Tribunal finds that these allegations do not establish any valid basis for the Applicant's pleas.

VII. In view of the foregoing, the application is rejected.

(Signatures)

Jerome ACKERMAN
President

Hubert THIERRY
Member

Francis SPAIN
Member

New York, 3 November 1993

R. Maria VICIEN-MILBURN
Executive Secretary